Nos. 332, 333 and 334

IN THE

Supreme Court of the United States

OCTOBER TERM 1955

No. 332

WASHINGTON PUBLIC SERVICE COMMISSION, PUBLIC UTILITIES COMMISSIONER OF OREGON, ET AL., *Appellants*,

vs.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, ET AL.

No. 333

UNION PACIFIC RAILROAD COMPANY, CHICAGO AND NORTH WESTERN RAILWAY COMPANY, ET AL., *Appellants*

vs.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, ET AL.

No. 334

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellants*,

vs.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY.

Appeals From The United States District Court for The District of Colorado

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BRIEF OF THE AMERICAN SHORT LINE RAILROAD ASSOCIATION, APPELLEE

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STATEMENT

The American Short Line Railroad Association, hereinafter referred to as the Association, intervened in support

of The Denver and Rio Grande Western Railroad, complainant before the Interstate Commerce Commission in Docket 30297—*Denver and Rio Grande Western Railroad Co.* v. *Union Pacific Railroad Co.*, the administrative proceeding giving rise to this litigation. The Association also intervened in support of the Rio Grande in the judicial review proceedings in the United States District Court for the District of Colorado [1] from which decision appeals have been taken by certain state commissions (No. 332), the Union Pacific Railroad Co. (No. 333), the United States, and the Interstate Commerce Commission (No. 334), in the October term 1955 of this Court.

The Association is a voluntary unincorporated association with a present membership of 289 common carriers by railroad of which all but three (3) are engaged in interstate and foreign commerce and therefore subject to the Interstate Commerce Act and related acts, and to the jurisdiction of the Interstate Commerce Commission. The Association, its members in general and many of its members in particular are vitally interested in the issues involved in these appeals with respect to the existence or establishment of through routes and rates and fair and reasonable divisions of revenues with particular reference to the establishment and maintenance of competitive joint through rates. The questions presented in these appeals are substantial and of public importance and their determination will have a vital effect on the affairs of practically all of the members of this Association.

In conformity with the spirit of the order of consolidation of this Court entered October 24, 1955, the Rio Grande, which is an appellant in No. 117 in this term and an appellee in Nos. 332, 333 and 334, filed on March 15, 1956 a consolidated opening brief covering the series of appeals from the decisions of the District Court of Colorado and the

[1] *The Denver and Rio Grande Railroad Co.* v. *United States*, 131 F. Supp. 372.

District Court of Nebraska[2] concerning the validity of the order entered by the Commission in the above-described proceeding.[3] The Rio Grande brief sets forth the appropriate recitals of jurisdiction and questions presented, and the Association adopts as its own the views expressed therein.

In Nos. 332, 333 and 334, appellants urge this Court to reverse the judgment of the Colorado court primarily on the basis that the court erred in finding as a matter of law that through routes exist between the points in dispute in connection with the Rio Grande, and the court's further conclusion that the Commission's failure to so find was erroneous and substantially prejudiced its disposition of the entire proceeding.

It is the view of the Association that the issue relating to the existence or non-existence of through routes represents the core of the controversy. Determination of this issue upon the facts of record in the light of pertinent judicial precedents will necessarily represent an important interpretation of applicable provisions of the Interstate Commerce Act and establish a substantial precedent for continued application by the Commission in its disposition of similar controversies. Inasmuch as members of this Association participate in countless through routes throughout the country and it is to be expected that a number of such railroads will be involved in future controversies concerning through routes and their establishment, it is the intention of the Association to present in this brief its views as to the merits of contentions advanced by the appellants regarding this key issue.

SUMMARY OF ARGUMENT

I

The opinion of the Colorado court sets forth substantial findings to support its conclusion as a matter of law that

[2] *Union Pacific R. R.* v. *United States*, 132 F. Supp. 72.
[3] 287 I.C.C. 611.

through routes exist between the points involved, and its further finding that Commission's failure to so find substantially prejudiced the entire proceeding.

II

Contentions advanced by the Union Pacific to show the invalidity of this conclusion by the Colorado court attempt to support the erroneous theory that cancelation of joint rates "closed" the through routes, despite admissions of record that such routes are now open and available for through service at through combination rates. In substance the untenable position of the Union Pacific appears to be that routes are not through routes if increased rates applying thereon cause a decrease in the volume of traffic moved in through service. The Union Pacific has not legally and factually closed the routes to through service although the Interstate Commerce Act (sections 6, 15(3) and 15(7)) authorizes, subject to certain safeguards, a carrier to do so. The *Thompson* and *Great Northern* cases and authorities therein cited although relied upon by the Union Pacific, clearly support a finding that through routes exist.

III

Contentions advanced by the government and other appellents reiterating contentions similar to those of the Union Pacific, and urging others of equally doubtful substance in support of the so-called "majority" report of five of the ten participating members of the Interstate Commerce Commission, disclose that the Commission's failure to find that through routes existed resulted from a confusion of its power to determine this question, separate and apart from its further authority and duty to determine under section 15(3) of the Act to what extent joint competitive through rates should be established. The Commission's procedure and conclusion are contrary to the Court's ruling in the *Great Northern* case.

ARGUMENT

The opinion of the Colorado court (R. 279) includes the following substantial findings with respect to the existence of through routes:

> (1) The Commission recognized that the first question for its determination was "whether or not the present routes by way of the Ogden Gateway constitute 'through routes' as that term is used in section 15 (3) and (4) of the Act." *Only five of the ten participating members of the Commission joined in the report and order of the Commission*, wherein it was first determined that through routes were not in existence over the Rio Grande in connection with the Union Pacific through the Ogden Gateway. Having reached this conclusion, the Commission proceeded upon the assumption that any order requiring the establishment of such through routes and joint rates over them must be grounded on findings as specified in § 15 (3) and (4). (R. 286-287)
>
> (2) We are of the opinion that the finding of the Commission that there are at present no through routes over the Rio Grande via the Ogden Gateway is not supported by substantial evidence. It is our view that the Commission erred as a matter of law in reaching the conclusion, upon a consideration of undisputed facts, that such through routes are not in existence. This erroneous, self-imposed restriction upon its authority to establish joint rates obviously prejudiced the entire proceeding. (R. 287-288)

The Colorado court in summarizing the "undisputed evidence bearing upon the crucial question of existing through routes," found—

> (1) That in 1897 the Union Pacific established joint through competitive rates with the Rio Grande to and from points in the northwest area through Ogden and

that while these rates were canceled by the Union Pacific in the period between 1906 and 1912, the through routes themselves were not canceled. (R. 288)

(2) That counsel for the Union Pacific and its principal traffic witness, respectively expressed the opinion and testified that the cancelation of the joint rates did not cancel the through routes, and that shippers at the present time are free to route traffic in through service via the Rio Grande if they are willing to pay the higher rates resulting by a combination of locals. The traffic witness further testified that some *joint* through rates are now published by the Union Pacific for application over the routes involved in the transportation of sheep and goats from the northwest area involved via the Ogden Gateway and the Rio Grande to points on the Missouri River and east thereof. (R. 288)

(3) That the evidence discloses the Rio Grande route has been used in the continuous movement of traffic to and from the closed door area at through combination rates without objection of the Union Pacific or participating railroads. The Colorado court then proceeded to describe the nature and volume of the through transportation service performed over the routes involved in the year 1948, and found that such movements were substantially similar for the years prior to 1948 and subsequent thereto until the commencement of hearings before the Commission in 1949. The Colorado court further noted that in the period November 1942 to August 1945 a number of shipments were diverted from other routes between the points involved to the Rio Grande route under orders issued by the Commission. (R. 288-289)

(4) After proceeding to evaluate and discuss the decision of the Commission and its purported reliance upon the *Thompson* case[4] as well as contentions ad-

[4] *Thompson* v. *United States*, 343 U.S. 549.

> vanced by the Union Pacific and railroads intervening in its support, the Colorado court concluded that the uncontradicted evidence clearly established the existence of through routes to and from points on the Union Pacific and the northwest area and Rio Grande via Ogden Gateway to and from Colorado common points, the Missouri River gateways and beyond. (R. 292)

It is the position of the Association that the opinion of the Colorado court is based on substantial evidence of record adequately described therein, and is in accord with prior rulings by this Court relating to the question of through routes. It is submitted that the contentions of the appellants fail to correctly interpret and apply pertinent prior decisions by this Court and do not afford a basis for reversal of the decision of the Colorado court.

Contentions Advanced by the Union Pacific (No. 333)

The opening brief submitted on behalf of the Union Pacific contains in its pages 53 to 82 the principal grounds urged by that appellant to show that the Colorado court erred in deciding that the Commission's finding that "there are at present no through routes, as that term is used in the Act, over the Rio Grande via Ogden or Salt Lake City on the traffic here concerned" was a finding not supported by substantial evidence and erroneous as a matter of law.

In substance the Union Pacific attempts to have this Court hold that a route is "closed"—consequently in *its* opinion not a through route—if there are no *joint* through rates applicable thereon and if the volume of traffic moved thereover is small as compared to movements over other existing routes as to which lower joint rates apply and over which the volume of traffic is far greater. Admittedly such a statement of its position would not be accepted by the Union Pacific, yet analysis of the contentions advanced

warrant such an appraisal.

In paragraph numbered 1 (UP Br. p. 62), being the first of a series of numbered paragraphs in which the Union Pacific *theorizes* as to the holding of the Colorado court and the significance of its conclusions, the Union Pacific advances the view that if the Colorado court was correct in its conclusion that through routes via the Rio Grande now exist because the routes did exist from 1897 to 1912 and were not canceled by the cancellation of joint rates applying thereon, it was "unnecessary and irrelevant" for the Colorado court to discuss the movement of transportation over such routes. Whereas we can agree with the Union Pacific that once it is apparent that through routes have been established and remain uncanceled it is unnecessary to show that there have been through movements thereover[*], yet this additional finding by the Colorado court based on evidence of record cannot be held to diminish the weight of the basic finding. In our opinion the additional findings by the Colorado court simply disclose its careful consideration of the *Thompson* case wherein this Court—faced with a Commission decision containing its bare conclusion, unsupported by any findings as to prior establishment of routes or movements thereon, or as to a "holding out" of through service by the carriers involved—held that the lack of evidence showing use of the route negatived its existence. In the instant record the Colorado court not only had before it the fact of prior establishment and non-cancelation of the routes, in addition to admissions by Union Pacific officials of their present existence and availability for through service, but evidence of their use by shippers, attesting to recognition—the "holding out"—

[*] *Great Northern Ry.* v. *United States*, 81 F. Supp. 921, affirmed *per curiam* 336 U.S. 933, wherein the court in finding that the Commission had in a prior proceeding ordered the establishment of through routes and rates, but which the Great Northern claimed were "commercially closed" due to the absence of joint rates permitting transit privileges, had no hesitancy in sustaining the Commission's finding that through routes existed despite the absence of through movements thereover due to the higher combination rates published by the Great Northern.

by the carriers involved. It was appropriate for the Colorado court to make complete and adequate findings on all the evidence.

At a later point in the same numbered paragraph the Union Pacific by reference to cases decided by the Commission in the period 1913-1915, undertakes to support the allegation that it is indisputable that the Commission and every one concerned regarded the action of the Union Pacific (in canceling joint rates) as "closing" the through routes and gateways in connection with the Rio Grande. The Union Pacific obviously weakens this point by its further statement that the routes were thus "closed", even though the routes then and now are available for use by shippers who are willing to pay high combination rates.

This argument of the Union Pacific, though difficult to follow, appears to suggest that a carrier simply by adjustment of the *level* of his rates can accomplish the legal and factual closing of a through route. In order for the statement to be comprehensible, it must be assumed that the Union Pacific is using the term "closed" as synonymous to "cancelation." It is true that increased rates may make a route commercially unattractive or uneconomical for a shipper, and perhaps cause a decrease in the volume of traffic over such a route. Such a result could occur if any railroad and its connections were to substantially increase joint rates over through routes between points as to which other transportation at lower cost was available. To argue that the route is being canceled or even "closed," in any significant sense obviously cannot be supported. It is equally clear that the action of the Union Pacific in canceling joint through rates with the Rio Grande and publishing higher local rates for through transportation, should be given no greater significance. The argument here advanced by the Union Pacific simply amounts to a factual statement that shippers will not ordinarily pay high rates if lower rates are available. The fact that shippers are being "commercially" deterred from fully utilizing the through routes in

connection with the Rio Grande, does not permit the conclusion that such through routes are canceled, are nonexistent, or are *in fact* closed.[6]

The cases cited at this point by the Union Pacific give no real support for the point that cancelation of joint rates here involved also canceled the through routes over which they applied.[6] An accurate appraisal of the cases cited will show that through routes or joint rates, either or both may, when justified, be canceled by a carrier through the use of *appropriate* tariff publications. We therefore agree with that part of the Union Pacific's statement (UP Br. p. 66) that tariff publications can be efficacious to cancel gateways and through routes, as we discuss in more detail at a later point, when properly descriptive of the cancelation being effected and consistently adhered to.

It is also true that the absence of competitive joint rates is what causes substantial injury to the Rio Grande and its supporting shippers. The routes are available, Union Pacific admits that, but the through rates resulting from the combination of locals published by the Union Pacific and the Rio Grande and their connections for through service are higher than the joint rates published by the Union Pacific with other connections for movements of similar traffic. The relief sought is therefore clear—the establishment of competitive joint rates, which the Commission has the authority to do without recourse to Section 15 (4) where there are existing through routes.[7]

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[6] Such a conclusion is contrary to, *Cancelation of Rates and Routes via Short Lines*, 245 I.C.C. 183, 185; *Quanah, A. & P.* v. *Atchison, T. & S. F. Ry. Co.*, 226 I.C.C. 201, 208; *Routing via Quanah, A. & P. Ry. Co.*, 229 I.C.C. 137, 139; sustained in *Thompson* v. *U. S.*, 20 F. Supp. 827; *Atchison, T. & S. F. Ry Co.* v. *United States*, 275 U.S. 768; and *Virginian Ry. Co.* v. *United States*, 272 U.S. 658.

[7] Section 15 (3) provides in substance that "The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish . . . joint rates, fares, or charges, applicable to the transportation of passengers, or property by carriers subject to this part, . . . or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided. . . ."

In its paragraph 2 (UP Br. p. 69) the Union Pacific seeks to minimize the significance of its admissions of record as to its recognition and use of the involved routes for through service by misuse of the *Thompson* case, *supra*. It is clear that the Court there cannot be understood to have held that routes are not through routes when they are admitted to be open for through shipments at regularly published local rates recognized and applied by the carriers participating therein and over which a volume of representative through shipments has moved. As we discuss more fully below the further contention in this paragraph that shippers have the right to route traffic "over any series of connecting railroads wherever physical interchange is possible" cannot be accepted on face value, in consideration of the fact that there is nothing in the Act that requires a carrier to accept any traffic as to which it has no published rate (49 USC 6). It is equally true that a carrier cannot be required to participate in through transportation where local rates are restricted against shipments in through transportation. Cf. *Southern Ry.* v. *Reid*, 222 U.S. 424.

In its paragraph 3 (UP Br. p. 70) the Union Pacific seeks to have this Court hold that there are no through routes in connection with the Rio Grande despite the fact that it admits it has in conjunction with the Rio Grande published joint through rates over such routes for the transportation of sheep and goats. No help for its position is afforded by the reference to the *Adrian Grain* case which when properly analyzed is simply descriptive of the Commission's power under § 15(4) of the Act. The Court might well feel constrained to inquire at this point as to what further proof of the existence of through routes is required when it is shown that as to specific traffic there are through routes admittedly open at *joint through rates* published by the Union Pacific, the Rio Grande and other connections.

In its paragraphs numbered 4 and 5 (UP Br. pp. 70, 72), the Union Pacific attempts to underplay the significance

of the through shipments it has accepted for transportation over its routes with the Rio Grande. The views there expressed lend clear support for our earlier appraisal of its position that in reality the Union Pacific is seeking to have the Court hold that routes are not through routes even though there are applicable thereon through rates by combination which have been and are now recognized and applied by the Union Pacific in the movement of a representative number of shipments. The fact that at the same time there are other through routes enjoying a substantially greater volume of traffic due to lower joint through rates does not reveal anything more than the fact that most of the traffic will follow the lower rates. No support from the *Thompson* case is afforded the Union Pacific here, because as there stated no traffic moved over the route involved. The fact that traffic has moved over the routes involved here clearly suggests that if lower combination rates applied the volume would be more comparable to that on the other routes.

In its paragraph numbered 6 (UP Br. p. 74) the Union Pacific suggests that the cancelation of joint rates is the only lawful way it could show that the routes were "closed." This contention of the Union Pacific fails completely to reveal any understanding or knowledge of the numerous findings by this Court and the Commission that the initial power to establish rates lies with the carrier, *Georgia* v. *Penna. R. Co.*, 324 U.S. 438, 459. Section 6 of the Interstate Commerce Act requires a carrier to publish rates applicable to the type of service it undertakes or holds itself out to perform. Sections 3 (4) and 1 (4) require carriers to establish *reasonable* interchange facilities and *reasonable* through routes with other rail carriers. Clearly it is within the contemplation of the provisions of such sections that all possible interchange facilities and through routes need not be established by rail carriers, and the Commission in full recognition of this interpretation has sustained actions of carriers in failing to provide interchange facilities and

interchange traffic when the effect thereof would be to permit the performance of competitive through transportation short-hauling the establishing carrier. *Northwest Metal Products* v. *C. M. St. P. R. Co.*, 272 I.C.C. 401, 406 (1948); *Sheboygan* v. *C. & N. W. Ry. Co.*, 227 I.C.C. 472, 478 (1938).

Thus it is apparent that the Union Pacific is in error when it seeks to suggest that it is powerless to prevent or avoid the performance of through transportation service which it conceives to be unnecessary in the public interest. The Union Pacific appears equally unaware of the numerous existing tariffs whereby rail carriers have restricted through transportation over certain routes. At this point we do not intend to admit that such action by the Union Pacific would be considered reasonable in consideration of the public interest, (see sections 15 (6) and 15 (7) of the Act) but we do suggest that if the Union Pacific clearly intended to close the routes via the Rio Grande to the performance of through transportation rather than enjoy the increased revenue from the high local rates, it could have sought to publish appropriate restrictions in its local tariffs, and consistent therewith refused to accept through shipments.

Union Pacific's reference to the provisions of Section 20 (11) of the Act are equally irrelevant. This section fixing the liability of carriers in the performance of rail transportation cannot be construed to require any carrier to perform a service for which no tariff has been published. *Boston & Maine* v. *Hooker*, 233 U.S. 97; *Southern Railway* v. *Reid*, 222 U.S. 424; *Cleveland, etc. R. Co.* v. *Hays*, (Ind. 1914) 104 N.E. 581; *Hunter* v. *American Ry. Express Co.* (Mo. App. 1928) 4 S.W. 2d 847; *Cook* v. *Northern Pac. Ry. Co.*, 203 P. 512. The Commission has held that where through routes do exist, Section 20 (11) requires the issuance of through bills of lading. *Seatrain Lines, Inc.* v. *A. C. & Y. Ry. Co.*, 226 I.C.C. 7, 31 (1938). It follows therefore that Union Pacific is not required to issue through bills of lading

if its tariffs restrict the use of any route to through carriage.

Union Pacific's remaining arguments in its paragraphs numbered 7-9 (UP Br. pp. 76-82), constitute a further effort to show that the opinion of the Colorado court is in other respects contrary to the Court's ruling in the *Thompson* case. Earlier in this brief we have set forth the substantive findings of the Colorado court in support of its conclusion as a matter of law that through routes are legally and factually existent. The significance of the *Thompson* case is further disclosed by the Court's opinion in the *Great Northern*[8] case, decided the same day. In that case the Court had no difficulty in finding that "the through routes in question already exist since the carriers concerned have continuously provided through service over the same through routes at a combination of separately established rates." (pp. 563-564) Such a finding should be made in the instant case.

In the *Great Northern* case the Commission was requested to and did establish joint rates for application over the routes involved. Similar relief is requested by the Rio Grande here. There also the Court held that (pp. 572-573).

> "The Interstate Commerce Act contemplates the existence of through routes in the absence of joint rates. And this Court expressly has approved the Commission's consistent recognition of the existence of through routes whether the through rates applicable thereto are joint rates or combinations of separately established rates."

The finding by the Colorado court is consistent with this ruling.

And finally the Court held that (pp. 573-574)

> "Whatever theories may be advanced as to determining the existence of a through route *where no traffic*

[8] *United States* v. *Great Northern Ry. Co.*, 343 U.S. 562.

passes over the route" citing the *Thompson* case "it is not questioned that through routes over the Montana Western and appellee's lines long have been in existence." (Emphasis supplied)

It is clear therefore that the Court in deciding the *Great Northern* case treated the *Thompson* case as one based on particular facts—a case involving an alleged route as to which no joint rates had ever been applicable, and over which no traffic moved. On the other hand the facts establishing a through route in the *Great Northern* case are strikingly similar to those in the instant case, but we suggest not nearly so conclusive. Here in addition to the combination rates applicable to a variety of commodities, *joint rates* now exist over the routes involved for the transportation of sheep and goats, and joint rates earlier existed with respect to other commodities. In refutation, the Union Pacific can only rely on the fact that its cancelation of the earlier joint rates—but not the routes—simply reduced the volume of transportation over the routes involved.

Contentions advanced by Government Appellants (No. 334)

The brief submitted on behalf of the United States and the Commission, contains a realistic summary of the law bearing on the question of the existence of through routes —a question which is there characterized as a ". . . vexing problem—one which has occupied the attention of the Congress, the Commission, and the courts for a good many years. . . ." (Govt. Br. p. 60.)

Although seemingly contrary to the views of the Union Pacific the government appellants recognize that the Court's opinion in the *Thompson* case involved a case ". . . concededly . . . distinguishable on its facts" (Govt. Br. pp. 49-50), yet the government seeks to urge that a similar conclusion should here be reached.

We differ also with the rationale of the conclusions reached by the government. At one point it is suggested

that the Commission's judgment on the question "largely factual in nature," of the existence of through routes, "is plainly entitled to great weight and should not be disturbed unless found to be arbitrary." Whether or not in respect to this type of question such a suggestion is usually pertinent, it should not be accepted in the instant case, where as found by the Colorado court *only five of the ten* Commissioners participating in the decision held that through routes did not exist.[9]

At pages 69-70 of their brief government appellants in stating that the Union Pacific never solicited shipments for movement over the Rio Grande, suggest that the record shows the shipments it accepted were so routed through "ignorance or inadvertance of shippers or originating carriers." In reply to this statement it is appropriate to suggest that if the course of business of the Union Pacific was thus so unascertainable, it cannot be understood as having legally and factually closed the route to through shipments. The existence of published rates unrestricted as to through transportation, clearly made the routes available to all the public. In the same vein, if the Union Pacific's "whole course of conduct . . . so far as revealed, has been for many years and is now to guard jealously its long haul and not open commercially the Rio Grande routes on this traffic," (Gov't. Br. p. 73)—why, it is pertinent to ask, did the Union Pacific fail to legally and factually close the through routes, and paradoxically publish rates unrestricted as to through transportation, and accept shipments over such routes?

The government further suggests that the "holding-out" by the Union Pacific to perform through transportation of sheep and goats by its publication of *joint through rates* for their transportation, does not warrant a holding-out to perform through transportation of other commodities. (Gov't. Br. pp. 73-74). We suggest that the correct answer is that the "holding-out" is clearly evident by the showing

[9] See opening brief for the Rio Grande pp. 50-52.

of acceptance of through shipments. The willingness to move sheep and goats at competitive joint through rates, and other commodities at through combination rates clearly proves the basic issue that through routes exist. The disinclination of the Union Pacific to move most commodities on rates equal to those applying over its other routes cannot be used as the sole criteria to support a conclusion that such routes are not in existence.

Much of the argument in the government brief is of course directed to supporting the theories advanced by the Commission in the report subscribed to by five of the ten participating Commissioners. These five Commissioners must be understood as supporting the theory that a finding that through routes exist, was tantamount to short hauling the Union Pacific. Such a view is clearly contrary to the holding of this Court in the *Great Northern* case, where it is said "... the establishment of joint rates is an act separate and distinct under the statute from the establishment of through routes." (343 U.S. 573) Thus the mere finding that through routes existed, as was alleged by the Rio Grande in its complaint to the Commission, would not grant the relief it or interested shippers seek. This is no more clearly shown than by the fact that routes are admitted to be open and available to shippers who are willing to pay the higher charges applicable. Obviously, therefore, it is the level of rates which is the impediment to full utilization of the routes. To what degree this impediment is to be removed is a question which remains unanswered by the Commission, and which the Colorado court's judgment requires the Commission to determine free of the limitations of section 15 (4).

Brief reference would seem appropriate to the basic criteria available for disposition of this question, as relied on by the Court in the two much discussed recent decisions in the *Thompson* and *Great Northern* cases. In *Through*

Routes and Through Rates, 12 I.C.C. 163, 167, the Commission said:

> "Therefore, it is settled that, whatever other facts or incidents of a shipment may serve to prove the existence of a through route, a through bill of lading is, as to the carriers recognizing it, *conclusive evidence* of the existence of such through route." (Emphasis supplied)

In the light of this standard, the acceptance by the Union Pacific of through shipments on through bills of lading becomes highly significant.

At page 165 of the report in the above-cited proceeding the Commission said:

> "A joint rate is simply a through rate, every part of which has been made by express agreement between the carriers making the through route. *The joint rate is a rate of a through route*, but it not the only through rate recognized by the Act and the decisions. (Emphasis supplied)

In the light of this statement the "holding-out" of the Union Pacific to accept through shipments of sheep and goats at *joint rates* is equally highly significant.

We submit these facts are critical in the determination of this question. The court in the *Great Northern* and *Thompson* cases reiterated the substance of the Commission's conclusions in its *Through Routes and Through Rates* proceeding, supra, stating—

> "In short, the test of the existence of a 'through route' is whether the participating carriers hold themselves out as offering through transportation service."

The government appellants like other defendants find themselves in the position of contending that the *volume* of movements rather than the *fact* of such movements, rep-

resents the conclusive element in determining whether through routes exist.

This position is practically a restatement of the position which the Commission was ultimately forced to take when it concluded that the routes are *legally existent but commercially closed*. What is the legal significance of such a conclusion as affecting the determination of the issue relating to the *existence* of through routes?

To attribute it any legal significance, is to assume that the Commission believed that if it made a finding that the routes were open and available, it also believed that this alone would make such routes commercially competitive with other routes. Although this is clearly erroneous, because as the Court said in the *Great Northern* case, "the establishment of joint rates is an act separate and distinct from the establishment of through routes," and there thus remained the further question whether the Commission would establish competitive joint rates for all or any commodities, it would appear from other statements in the "majority" report of the Commission that such was its thinking. Pursuing this faulty reasoning the Commission stated that it would be error to hold that evidence of a few shipments could justify a finding of through routes because

> "Any other holding would constitute an open invitation for any shipper to set aside the provisions of section 15(3) and (4) of the Act simply by preliminarily making a shipment or two over a route sought to be opened commercially. . . ." (R. p. 65)

Whether or not the acceptance by a carrier of a few shipments over a route, clearly not the situation here, would justify a finding of the existence of a through route, it is apparent that such a finding would not as the Commission suggests "set aside the provisions of section 15 (3)" of the Act, and there would still remain, as here, the question whether the rates applicable should be modified.

The finding by the Court of existing through routes was crucial to its ultimate disposition of the *Great Northern* case, and it is equally important here. The further question as to what extent the through routes shall be made available to shippers at *competitive joint rates* is the question which when answered will determine to what degree such routes are to be competitive with other existing routes. This question the Commission did not reach because, by the above-described line of faulty reasoning it believed that the provisions of section 15 (4) precluded it from making such a finding.

Consequently the determination of the existence of through routes should have been made without consideration of the provisions of section 15 (4), but on the basis of the criteria clearly set forth in the *Thompson* and *Great Northern* cases and other authorities therein cited. The Commission obviously erroneously confused its power to find through routes with that relating to the establishment of joint rates.

Thus there was complete support for the finding by the Colorado court that the failure of the Commission to find free of the limitations of section 15 (4), that through routes existed, prejudiced the entire proceeding.

Other contentions advanced by the government and other appellants bearing on the issue of through routes, we submit are adequately answered by the foregoing comments and by the briefs submitted by the Rio Grande, and further discussion here is unnecessary.

CONCLUSION

For the reasons stated here and in the briefs submitted by the Rio Grande, The American Short Line Railroad Association respectfully submits that the decision of the United States District Court for the District of Colorado, involved in appeals Nos. 332, 333 and 334 should be affirmed,

with directions to the Interstate Commerce Commission that it proceed to a determination of the issues on the basis that through routes via the Ogden gateway are in existence, and that the Rio Grande is entitled to have the evidence considered and the case decided by the Commission free of the limitations of Section 15 (4).

Respectfully submitted,

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